IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7381 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AARVEE DENIMS & EXPORT LTD

Versus

UNION OF INDIA

Appearance:

1. Special Civil Application No. 7381 of 2004

MR PARESH M DAVE for Petitioner No. 1-2

MR JITENDRA MALKAN for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 10/08/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE M.S.SHAH)

On 29th June 2004, we had issued notice for final disposal as the matter is covered by a reported decision of this Court.

2. Mr Malkan, learned Senior Standing Counsel for the Central Government submits that he has instructions to draft and file affidavit on behalf of the respondents for opposing the petition and hence prays for an adjournment. However, in view of the facts and circumstances of the case and particularly the fact that the Tribunal has referred to all the facts, which Mr Malkan states, the respondents want to place on record, it is not necessary to grant any adjournment to enable the respondents to file such an affidavit-in-reply.

3. Rule. Mr Malkan waives service of Rule. The petition is taken up for final disposal today.

4. What is challenged in this petition under Article 226 of the Constitution is the order dated 7.4.2004/ 11.5.2004 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi dismissing the petitioners' RO Applications for restoration of the petitioners' appeals which were dismissed for non-prosecution and also the Tribunal's order dated 5.12.2003 dismissing the petitioners' appeals for non-prosecution.

5. The petitioners had preferred Appeal Nos.1238 and 1239 of 2002 for challenging the order-in-original dated 26.12.2001 passed by the Commissioner of Central Excise-I, Ahmedabad confirming excise duty of Rs.89,90,705/- against the petitioner-Company and also imposing penalties on the petitioners. In the appeals, the petitioners prayed for interim stay of the order under challenge and also prayed for waiver of pre-deposit under Section 35F of the Central Excise Act, 1944. By stay order dated 27.8.2002, the Tribunal granted the petitioners' prayer for waiver of pre-deposit with the following observations:-

> "We have heard the learned DR also. On perusal of the records and consideration of the documents, we are of the opinion that the appellant's prayer for waiver of pre-deposit merits acceptance. Accordingly, requirement for deposit of duty and penalties as a condition precedent for hearing of the appeal is waived and the recovery of the amounts stayed."

It appears that thereafter the appeals were listed for

hearing on a number of dates. However, none appeared on behalf of the appellants. Ultimately, on 5.12.2003, the Tribunal dismissed the appeals for non-prosecution by passing the following order:-

> "When the case was called, none appears on behalf of the appellants. The case was adjourned ten times for arguments and was adjourned at the request of the appellants. It appears that the appellants are not interested in pursuing the appeals before the Tribunal. The appeals are dismissed for non-prosecution."

The petitioners thereafter filed Misc. Application for restoration of the appeals which also came to be dismissed by the impugned order dated 7.4.2004/11.5.2004 (Annexure "D"). The petitioners have, therefore, challenged both the final order dated 5.12.2003 (Annexure "B") and miscellaneous order dated 7.4.2004 /11.5.2004 (Annexure "D") and have prayed for a direction that the Tribunal may hear and decide the petitioners' appeals on merits.

6. At the hearing of the petition, Mr Paresh M Dave, learned counsel for the petitioners has submitted that the petitioners have a good case on merits and, therefore, the Tribunal had earlier passed stay order granting waiver of pre-deposit of duty and penalties. Some explanation is sought to be offered for the absence of the learned advocate for the petitioners on 5.12.2003 and that on some previous occasions, the petitioners' learned advocate had remained present before the learned Tribunal. It is further submitted that in any view of the matter, as held by this Court in Viral Laminates Pvt. Ltd. vs. Union of India, (1998) 100 ELT 335, the Tribunal has no power to dismiss the appeals for default in appearance.

7. On the other hand, Mr Malkan, learned Senior Standing Counsel for the Central Government has opposed the petition and has submitted that the Tribunal has considered all the relevant aspects including the fact that the appeal was listed for hearing on as many as ten times and that the Tribunal had already granted indulgence earlier on 26.9.2002 when the matter was adjourned at the request of the learned advocate for the petitioners and that the order-sheet also revealed that not on a single day the learned advocate for the petitioners has appeared for the Bench even for seeking adjournment, and that on 5.12.2003 neither the learned advocate had appeared nor anybody had made a request for adjournment. Therefore, the Tribunal has rightly

rejected the applications for restoration.

8. Having heard the learned counsel for the parties, it appears to us that when the decision of this Court in Viral Laminates Pvt. Ltd. vs. Union of India, (1998) 100 ELT 335 was cited before the Tribunal, the Tribunal was required to have due regard to the principles laid down by this Court in the aforesaid decision specifically holding that, that part of Rule 20 of Customs, Excise & Gold (Control) Appellate Tribunal (Procedure) Rules, 1982 which empowers the Tribunal to dismiss the appeal for non-appearance was ultra-vires the provisions of Section 35C(1) of the Central Excise Act, 1944 and Section 129B(1) of the Customs Act, 1962. Even while holding that in view of the aforesaid decision the order dated 5.12.2003 dismissing the appeals for non-prosecution was required to be recalled, we do find some substance in the submissions of Mr Malkan also that the Tribunal had granted indulgence to the petitioners on a number of occasions and, therefore, that aspect is also required to be considered while passing final orders.

9. We are, therefore, of the view that the interests of justice would be served if, while setting aside the order dated 5.12.2003 (Annexure "B") dismissing the appeals for default and the order dated 7.4.2004/ 11.5.2004 (Annexure "D") rejecting the restoration applications, the petitioners are also required to be directed to pay the respondent-authorities a sum of Rs.10,000/- (Rupees ten thousand) by way of costs, which shall be paid to the respondent-authorities by 25th August 2004. Upon the costs being so paid to the respondents, Appeal Nos.E/1238-1239/2002 shall stand restored on the file of Customs, Excise and Service Tax Appellate Tribunal, New Delhi and the Tribunal shall hear and decide the appeals on merits in accordance with law.

It is directed accordingly.

Further, in view of the request being made by Mr Malkan, Senior Standing Counsel for the respondent-authorities that the date of hearing before the Tribunal may be fixed so as to dispense with the requirement of issuing fresh notice to the petitioners, we direct that the above-numbered appeals shall be listed for final hearing before the Tribunal on 22nd September 2004.

10. Rule is accordingly made absolute to the aforesaid extent.

(M.S. SHAH, J.)

(D.A. MEHTA, J.)

zgs/-